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IN THE SUPREME COURT of the STATE OF UTAH

FILED

JUN 19 1959

Clerk, Supreme Court, Utah

EDWARD H. WHITE,
Plaintiff and Respondent,

vs.

JOHN ALFRED NEWMAN,
Defendant and Appellant.

Case No. 9038

BRIEF OF APPELLANT

HURD, BAYLE & HURD
and WALLACE R. LAUCHNOR
Attorneys for Defendant and Appellant

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IN THE SUPREME COURT
of the
STATE OF UTAH

EDWARD H. WHITE,
Plaintiff and Respondent,

vs.

JOHN ALFRED NEWMAN,
Defendant and Appellant.

Case No. 9038

BRIEF OF APPELLANT

STATEMENT OF FACTS

This action was filed by the plaintiff, Edward H. White, against the defendant, John Alfred Newman, for the recovery of damages arising from a fire which occurred on the premises of defendant's gasoline station and involved plaintiff's motorcycle.

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On February 22, 1958, the day of the fire, plaintiff rode his motorcycle into defendant's gasoline station located on the corner of 11th East and 17th South in Salt Lake City, Utah (Tr. 3, 4, 17 & 18). He was waited on by one Dan Giatras, an employee of defendant (Tr. 4, 17 & 18). Plaintiff's motorcycle was a 1947 Indian, 74 (Tr. 2) and was equipped with two gasoline tanks, one on the right side and one on the left side, each located directly above and within a few inches of the motor (Tr. 4 and 12). The attendant filled the right tank first (Tr. 5) and then commenced to fill the left tank which held two gallons and was twice as large in capacity as the right tank (Tr. 5 & 18). The motor on plaintiff's cycle continued to run during the time the gasoline was being placed in the tanks because plaintiff had a difficult time in starting it (Tr. 10, 11 & 12). During the process of filling the left tank, plaintiff testified that the attendant, Giatras, turned his head and the gasoline overflowed onto the engine, resulting in a flash fire (Tr. 6). According to Giatras, the left tank was not full and the air pressure within the tank caused the gasoline to backflow, and the gasoline thereafter came into contact with the hot motor and manifold, resulting in the flash fire (Tr. 18, 19 & 20). On cross examination, plaintiff said he didn't know whether the tank actually overflowed or that it backflowed due to air pressure (Tr. 11).

Plaintiff testified that he was fully aware that his motorcycle motor and manifold were hot and that he was rather fearful that if any gas spilled that it could ignite from those conditions (Tr. 12 & 13). He was also aware of the dangerous potential of gasoline in connection with heat and testified that he normally shut the motor off in his automobile while having

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it filled with gasoline because of the danger of fire (Tr. 13). From the evidence adduced by the defendant, it was apparent that when the gasoline backflowed from the left tank, it ran down a few inches to the hot motor and manifold, and then ignited (Tr. 19, 20, 21 & 22).

As to the element of damages to the motorcycle, plaintiff failed to prove the damages with any certainty. He testified he had one repair estimate of $333.60, but also said that the motorcycle was a total loss and couldn't be repaired (Tr. 9, 10, 13, 14 & 15). He further testified that he had no opinion as to the salvage value of the motorcycle after the fire (Tr. 14, 15 & 16). The one written estimate of repairs was never introduced into evidence and the motorcycle had never been repaired (Tr. 10).

At the conclusion of the trial, the court took the case under advisement (Tr. 22), and thereafter granted plaintiff judgment for the sum of $333.60 (R. 36). This judgment was based upon Findings of Fact and Conclusions of Law wherein the court concluded that defendant's attendant was negligent and that plaintiff was also negligent, but that it was the heat of the manifold rather than a spark from the running motor that caused the fire, and plaintiff's negligence did not contribute to the proximate cause of the damage (R. 34 & 35).

STATEMENT OF POINTS

The defendant has designated and included the entire record and all of the proceedings and evidence in this action and on this appeal relies upon the following points:

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POINT I

THE TRIAL COURT ERRED IN FINDING AND CONCLUDING THAT DEFENDANT'S EMPLOYEE WAS NEGLIGENT IN ALLOWING GASOLINE TO OVERFLOW THE TANK ON PLAINTIFF'S MOTORCYCLE ON THE GROUND AND FOR THE REASON THAT SUCH IS WHOLLY UNSUPPORTED BY THE EVIDENCE.

POINT II

THE TRIAL COURT ERRED IN DENYING THE MOTIONS OF THE DEFENDANT FOR A JUDGMENT OF NO CAUSE OF ACTION ON THE GROUND THAT PLAINTIFF WAS CONTRIBUTORILY NEGLIGENT AS A MATTER OF LAW AND THAT HE ASSUMED THE RISK BY HIS CONDUCT.

POINT III

THE TRIAL COURT ERRED IN CONCLUDING THAT PLAINTIFF'S NEGLIGENCE IN ALLOWING THE MOTOR TO RUN WHILE THE GAS TANK ON HIS MOTORCYCLE WAS BEING FILLED DID NOT CONTRIBUTE TO THE PROXIMATE CAUSE OF PLAINTIFF'S DAMAGE.

POINT IV

THE TRIAL COURT ERRED IN FINDING THAT PLAINTIFF'S MOTORCYCLE WAS DAMAGED IN THE REASONABLE SUM OF $333.60 ON THE GROUND AND

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FOR THE REASON THAT SAID FINDING IS WHOLLY UNSUPPORTED BY THE EVIDENCE.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN FINDING AND CONCLUDING THAT DEFENDANT'S EMPLOYEE WAS NEGLIGENT IN ALLOWING GASOLINE TO OVERFLOW THE TANK ON PLAINTIFF'S MOTORCYCLE ON THE GROUND AND FOR THE REASON THAT SUCH IS WHOLLY UNSUPPORTED BY THE EVIDENCE.

The only evidence before the court touching on the question of whether or not defendant's employee Giatras was negligent in the filling of the gasoline tank on plaintiff's motorcycle comes from the testimony of plaintiff. On direct examination, plaintiff testified that Giatras took the hose out of the right tank and put it in the left tank and while filling the latter tank, he turned his head and the gas overflowed onto the engine resulting in a flash fire. In testifying about this point on cross-examination, plaintiff said (Tr. 11):

> By Mr. Bayle: "So you don't know whether it actually overflowed or that it backflowed due to air in the tank, do you?
>
> Answer: No, I don't."

Giatras testified that the tank wasn't full and due to the air pressure inside of it, the gasoline suddenly was forced out and it backflowed, running down onto the hot motor and mani-

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fold (Tr. 18, 19 & 20). Giatras denied plaintiff's claim that he was looking elsewhere at the time of the fire and described in detail exactly what happened, thereby discrediting plaintiff's claim of what took place (Tr. 19).

It is well settled that the testimony of a party as a witness in his own behalf is no stronger than that given on cross-examination. Plaintiff admits that he doesn't know whether the gasoline being put into the tank actually overflowed or backflowed and accordingly there is no competent or substantial evidence in the record from which the trial court could find negligence on the part of defendant's employee. It is common knowledge that gasoline has a tendency to backflow when being run into a closed tank. This is due to air pressure being in the tank as was testified to by Giatras (Tr. 18 & 19). Thus, can it be said under these circumstances that it was any more than speculation for the trial court to conclude that the gasoline overflowed the tank and defendant's employee was thereby negligent. We recognize that if there is any substantial and competent evidence upon which the court, as trier of the facts, acting fairly and reasonably, could make such a finding of negligence, that it should not be disturbed on appeal. However, this means more than a mere scintilla of evidence or that such evidence is entirely speculative in nature.

Under this situation, we respectfully contend that the instant case falls within the rule laid down by this Honorable Court in Seybold vs. Union Pacific Ry. Co., 121 Utah 61, 239 Pac. 2d 174, and in Wyatt vs. Baughman, 121 Utah 98, 239 P 2d 193; and that the finding and conclusions by the trial

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court that defendant's employee was negligent is wholly unsupported by the evidence.

POINTS II and III

POINT II

THE TRIAL COURT ERRED IN DENYING THE MOTIONS OF THE DEFENDANT FOR A JUDGMENT OF NO CAUSE OF ACTION ON THE GROUND THAT PLAINTIFF WAS CONTRIBUTORILY NEGLIGENT AS A MATTER OF LAW AND THAT HE ASSUMED THE RISK BY HIS CONDUCT.

POINT III

THE TRIAL COURT ERRED IN CONCLUDING THAT PLAINTIFF'S NEGLIGENCE IN ALLOWING THE MOTOR TO RUN WHILE THE GAS TANK ON HIS MOTORCYCLE WAS BEING FILLED DID NOT CONTRIBUTE TO THE PROXIMATE CAUSE OF PLAINTIFF'S DAMAGE.

We shall now consider the problem of plaintiff's contributory negligence and if under all of the circumstances, he did not assume the risk by requesting defendant's employee to fill the tank on his motorcycle while the motor was running.

It is to be noted that gasoline is highly volatile and will readily ignite when in proximity to a spark, flame or extreme heat. This Court has held that it is reasonable to take judicial

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knowledge of that fact in Vadner vs. Rozzelle, 88 Utah 162, 45 P 2d 561.

The evidence in our instant case demonstrates without equivocation that plaintiff actually knew and appreciated the danger of filling the tanks while the motor was running on his motorcycle. The motor was hard to start and that was the reason expressed by plaintiff for letting it run while procuring the gasoline (Tr. 11 & 12).

Plaintiff further testified on cross-examination (Tr. 12 & 13):

"Q. You made no effort to shut the motor off before you had the gas line put into it?

A. No, sir.

Q. And that's always your practice, is it not, with this particular motorcycle?

A. Yes, sir.

Q. And I think you were aware that this motor was hot at the time, weren't you?

A. Yes, sir.

Q. And you were rather fearful that if any gas did spill over that it could ignite from the hot motor, weren't you?

A. Yes, sir.

Q. And I guess you were also aware of the dangers potential of gasoline in connection with heat?

A. Yes, sir.

Q. How about your automobile, did you normally shut the automobile off when you go into the station?

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A. Yes, sir.

Q. And why did you do that?

A. Well, it's dangerous if it backfires; it can set the car on fire.

Q. I see; so you were fully aware of this problem at the time?

A. Yes, sir.

By the foregoing testimony, it is readily apparent that plaintiff possessed a full and complete knowledge of the dangerous situation, even testifying that the reason he shut off the motor when having his automobile serviced, was to avoid a flash fire due to a spark in proximity to the gasoline. Under these circumstances, plaintiff elected to take a chance and by doing so, he was grossly careless and negligent.

In the case of Gust vs. Muskegon Cooperative Oil Co., (Michigan) 198 N.W. 175, plaintiff had a lighted lantern on the floor of her car by her legs, when she drove into the defendant's gas station. The gas tank was located by the dashboard or hood of the car and the pipe receiving the fuel was directly over the tank. The plaintiff sat behind the steering wheel with the lantern burning while gasoline was being delivered to the tank of her car. In making the delivery, the defendant's employee was also aware of the burning lantern and in the process of filling the tank on plaintiff's car, the employee negligently spilled gasoline onto the clothing of the plaintiff, and it immediately ignited, severly burning plaintiff. The trial court held that plaintiff was contributorily negligent as a matter of law and refused to submit the case to the jury. On appeal, the Michigan Supreme Court had this to say:

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"The top of the pipe in which the gasoline was being poured into the tank was very close to the knees of the plaintiff as she sat in her car, and the flame in the lantern, which sat at her feet, was not far distant from it. The danger was so apparent that we cannot but conclude, as did the trial court, that she should be charged with knowledge of it. To hold otherwise, would simply put a premium on carelessness in the handling of this dangerous liquid."

In determining whether plaintiff was contributorily negligent as a matter of law, the evidence, and all reasonable inferences therefrom, must be viewed in the light most favorable to plaintiff. Finlayson vs. Brady, 121 Utah 204, 240 P.2d 491; Mingus vs. Olsson, 114 Utah 505, 202 P. 2d 495.

We respectfully submit that all of the evidence in our instant case is overwhelmingly against the plaintiff, and there is but one inference to be drawn therefrom, and that inference points unerringly to the negligence of the plaintiff proximately contributing to cause his own damages.

In the Pre-trial Order, the affirmative defense of assumption of risk was raised as one of the issues by the defendant (R. 8 & 9). We believe that under the circumstances of this case the doctrine of assumption of risk is applicable. The plaintiff testified as to actual knowledge of the dangerous situation and that he knew and appreciated the likelihood of gasoline becoming ignited by the conditions of a running motor and heat in proximity thereto (Tr. 12 & 13). He voluntarily exposed himself to the danger by insisting on keeping the motor running while gasoline was being put in the tanks (Tr. 12). Knowledge of the risk is the watchword of assump-

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tion of risk. By his conduct, plaintiff placed himself squarely within the doctrine as defined in 38 Am. Jur. 848, Sec. 173, and by Shearman & Redfield on Negligence, Vol. 1, page 332, and as considered by this Court in Clay vs. Dunford et al, 121 Utah 177, 239 P. 2d 1075.

The trial court in paragraph 3 of the Conclusions of Law found plaintiff negligent in allowing his motor to run while his tank was being filled, but concluded that it was the heat of the manifold rather than spark from the motor that caused the fire, and that plaintiff's negligence did not contribute to the proximate cause of the damage (R. 35). There is no evidence in the record upon which to base such a conclusion. The only testimony even remotely touching upon that phase of the problem is where plaintiff testified that the wiring and spark plugs were covered with rubber insulation and that the same were contained in a box with a screw down lid. However, plaintiff further testified that he didn't know whether the lid was liquid tight (Tr. 4 & 5). Thus there is no evidence as to what actually ignited the gasoline. It could have been the heat of the motor, the hot manifold, a spark from the exhaust, or a spark from the motor. It is pure speculation. However, we fail to see what bearing this has on the problem in light of plaintiff's testimony that he was fully aware of the dangerous sitution and was actually fearful that if any gasoline did spill, that it could ignite (Tr. 12 & 13).

In view of the foregoing, we respectfully submit that plaintiff was contributorily negligent as a matter of law and that because he testified as to having actual knowledge of the dangerous situation, and voluntarily exposed himself and his

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motorcycle to the risk, he accordingly assumed the risk of such conduct and should not be entitled to recover damages from the defendant.

POINT IV

THE TRIAL COURT ERRED IN FINDING THAT PLAINTIFF'S MOTORCYCLE WAS DAMAGED IN THE REASONABLE SUM OF $333.60 ON THE GROUND AND FOR THE REASON THAT SAID FINDING IS WHOLLY UNSUPPORTED BY THE EVIDENCE.

We assume the trial court's award of damages in the sum of $333.60 is founded upon the written estimate mentioned by plaintiff and his counsel in the transcript of testimony (Tr. 8 & 9). This estimate was never offered or received in evidence and no witness was called by plaintiff to prove the reasonability of the items aggregating the aforementioned amount. The trial court indicated to plaintiff's counsel the incompetence of this proof without expert testimony (Tr. 7 & 8), and we fail to find in the evidence any further proof to support the damages ultimately awarded to the plaintiff (Tr. 9, 10, 14 & 15).

Another facet of the problem is that plaintiff testified from his experience with motorcycles, that this damaged one was apparently a total loss and could not be repaired so that it would be ridable (Tr. 9). If this in fact be true, the plaintiff's true measure of damages would be the reasonable value of the motorcycle immediately before the loss or destruction, less any salvage value thereof. This Court has declared this to be

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the rule in Park vs. Moorman Mfg. Co. et al, 121 Utah 339, 241 P. 2d 914; Hill vs. Varner, 4 Utah 2d 166, 290 P. 2d 448.

We are unable to ascertain from the evidence the theory of plaintiff's damages and feel there is no basis established in the testimony for the amount awarded by the trial court. This seems so particularly in view of plaintiff's statement that he considered the motorcycle to be a total loss but had no idea of the value before the loss, based upon competent testimony, nor was any salvage value established.

We respectfully urge that the amount of damages awarded by the trial court is unsupported by the evidence and purely speculative.

CONCLUSION

We respectfully submit that each of the foregoing points of error is well taken and should be sustained, and that the judgment of the trial court should be reversed with direction to enter judgment in favor of the defendant and against the plaintiff, no cause for action, with costs to appellant.

Respectfully submitted,

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